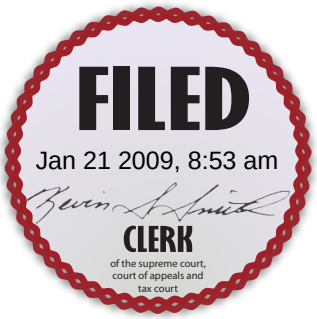

ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN PICKETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0807-CR-322
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0703-FA-264

January 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

John Pickett appeals the sentence he received following his conviction of Burglary Resulting In Serious Bodily Injury,[1] a class A felony, and Battery,[2] a class C felony, which were entered upon his plea of guilty. Pickett presents the following restated issues for review:

1. Did the trial court err in identifying mitigating circumstances?

2. Was the sentence inappropriate in light of Pickett's character and the nature of his offenses?

We affirm.

The facts favorable to the convictions are that on March 20, 2007, Pickett and Josh Engler entered into the garage of Jess Parker without Parker's permission, intending to steal Parker's property. While Pickett and Engler were in the garage, Parker entered the garage and discovered them. A scuffle ensued, during which Pickett struck Parker in the head with a hammer. Parker's father, Rob, was waiting for Parker in a car parked outside the garage when he heard the commotion. Rob saw Pickett and Engler run from the building and tackled Pickett. Pickett stabbed Rob several times in the head with a screwdriver and then fled the scene. Rob and Parker were transported to the hospital, where each received staples and stitches for head wounds suffered during the incident.

Pickett was charged under Count I with burglary resulting in bodily injury as a class A felony, under Count II with battery by means of a deadly weapon as a class C felony, under Counts III and IV with theft as class C felonies, and under Counts V through VIII with four

[1] Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2008 2nd Regular Sess.).
[2] Ind. Code Ann. § 35-42-2-1 (West, PREMISE through 2008 2nd Regular Sess.).

additional counts of theft, all as class D felonies.[3] On April 17, 2008, Pickett entered into a plea agreement with the State whereby he agreed to plead guilty to Counts I and II, in exchange for the State's agreement to dismiss the remaining charges. The plea agreement left sentencing to the trial court's discretion except that the sentences for Counts I and II were to run concurrently. The court accepted the plea agreement and a sentencing hearing was conducted on May 21, 2008. At the conclusion of that hearing, the court found a single mitigating circumstance, i.e., that Pickett intends to pay restitution, and found as an aggravating circumstance his history of criminal and juvenile delinquent behavior. The court further found that the aggravating circumstances outweighed the mitigating circumstance and imposed an enhanced, forty-year sentence for the burglary conviction, and the maximum eight-year sentence for the battery conviction, with those two sentences to be served concurrently, with six years suspended to probation.

1.

Pickett contends the trial court abused its discretion in failing to identify as mitigating circumstances the fact that he pleaded guilty and that he expressed remorse. When imposing a sentence for a felony offense, trial courts are required to enter a sentencing statement. This statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 If the court finds aggravating or mitigating circumstances, it "must

[3] Pickett and Engler were charged under these counts with stealing property from several other victims that day.

identify all *significant* mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). An abuse of discretion in identifying or failing to identify aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). Also, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482.

We begin with the claim that the trial court abused its discretion in failing to find Pickett's expression of remorse as a mitigating circumstance. Through his attorney,[4] Pickett expressed remorse for the harm he caused the Parkers. Notwithstanding these statements, the trial court did not mention remorse as a mitigator. We presume this means the trial court was not convinced the expression of remorse was credible. From our distant vantage point, we are reluctant to substitute our judgment for the trial court's on this issue. *See Gibson v. State*, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) ("[r]emorse, or lack thereof, by a defendant often

[4] Counsel stated:

> Mr. Pickett and I discussed extensively his right to allocution and he has, I believe as even documented in the Presentence, is quite frankly frightened about his ability to speak cogently both to you and in front of his family. He has asked me, on his behalf, I don't believe they're here, but to issue an apology to the victims.

Transcript at 30. Counsel went on to state that Pickett "did not intend that anyone be hurt" in the course of the burglary and felt "horrible" about the Parkers' injuries. *Id.* at 31.

is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility"); *see also Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) ("[w]ithout evidence of some impermissible consideration by the court, we accept its determination of credibility"). Whatever its reasons for discounting Pickett's claim in this regard, the indirect expression of remorse conveyed through his attorney was not so compelling as to convince us that the trial court's decision was an abuse of discretion.

Pickett next claims the trial court abused its discretion in failing to find his guilty plea as a mitigating factor. We agree that Pickett's guilty plea is a mitigating factor and that the trial court should have acknowledged it as such, because it is well established that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *See Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). A defendant is not entitled to reversal, however, merely by establishing that the trial court failed to find his or her guilty plea as a mitigating factor. Our Supreme Court has held, an "allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record *but also that the mitigating evidence is significant*." *Anglemyer v. State*, 875 N.E.2d at 220-21 (emphasis supplied). The extent to which a guilty plea is mitigating will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). Moreover, as has been frequently observed, "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525. For instance, a guilty plea's significance is diminished if there was substantial admissible evidence of the

defendant's guilt. *See Scott v. State*, 840 N.E.2d 376 (Ind. Ct. App. 2006), *trans. denied*. A guilty plea's significance may also be diminished in direct proportion to the benefit realized by the defendant in accepting it. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*.

Although Pickett's guilty plea obviated the need to present evidence at trial, the evidence of guilt, including presumably the testimony of the two victims, was substantial. Moreover, in exchange for Pickett's guilty plea, the State dismissed five other felony charges. Because the evidence of guilt was substantial, and because Pickett received a substantial benefit for his guilty plea, the trial court did not commit reversible error in failing to find his guilty plea as a significant mitigating circumstance.

2.

Pickett contends his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d at 381. Pickett bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

With respect to Pickett's character, we note that he pleaded guilty to this offense, which is a valid mitigating factor. As noted above, however, a guilty plea is not necessarily a significant mitigating factor. *Cotto v. State*, 829 N.E.2d 520. In this particular case, Pickett received a significant benefit in exchange for his plea and the evidence against him was strong. Under these circumstances, we cannot say the guilty plea speaks highly of Pickett's character.

The presentence investigation report submitted by the Lawrence County Probation Department indicates that Pickett had juvenile delinquent true findings of illegal consumption of alcohol, burglary, theft, curfew violation, possession of a handgun with obliterated markings, reckless possession of paraphernalia, and battery resulting in serious bodily injury. As an adult, Pickett has been convicted of operating while intoxicated as a class A misdemeanor, disorderly conduct as a class B misdemeanor, and resisting law enforcement as a class D felony. We also note that Pickett was arrested three additional times as an adult, for check deception, conversion, and illegal consumption by a minor. *See Cotto v. State*, 829 N.E.2d at 526 ("a record of arrest … may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character [concerning] the risk that he will commit another crime").

This criminal history is not as extensive as others we have encountered, but it does include a weapons offense and another battery offense that resulted in serious bodily injury. Considering the facts and circumstances of the instant offense, Pickett's particular criminal

history is even more troubling and thereby entitled to some aggravating weight. Among other things, it validates the trial court's observation, "I'm not convinced it wouldn't reoccur once he gets out." *Transcript* at 37. We share that concern. This, in combination with Pickett's habitual substance abuse, indicates he poses a risk of re-offending.

Summarizing again the nature of the offenses, Pickett beat two men in the head with a hammer and a screwdriver.

After reviewing Pickett's character and the nature of the offenses of which he was convicted, we cannot say the enhanced sentence imposed by the trial court is unreasonable.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur